UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

KROGER LIMITED PARTNERSHIP I, a limited partnership, and KRGP, Inc., general partner,

Respondent

and

Case 25-CA-099851

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 362,

Charging Party

Ahavaha Pyrtel, Esq. and
Katherine E. Vogt, Esq.,
for the General Counsel.
Michael R. Lied, Esq. and
Mark Fjelde, Esq.,
for the Respondent.
Mr. Eric Penn,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois on August 13 and September 17, 2013. Laborers International Union of North America, Local Union No. 362 (Union) filed the charge on March 7, 2013¹ and the Acting² General Counsel issued the complaint on June 28, 2013. The complaint alleges that Kroger Limited Partnership I, a limited partnership, and KRGP, Inc., general partner (Respondent) violated Section 8(a)(1) of the Act by instructing representatives of the Union to cease distributing flyers to Respondent's customers complaining about Respondent's business practices and to leave Respondent's

¹ All dates are in 2013 unless otherwise indicated.

² Although Acting General Counsel Lafe E. Solomon issued the complaint, General Counsel Richard F. Griffin Jr., was subsequently confirmed and serves in this capacity as of the date of this decision. Accordingly, the prosecuting entity of the Agency is herein referenced as the General Counsel.

property.³ (GC Exh. 1(d).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act and asserting four affirmative defenses. (GC Exh. 1(f).) The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,⁴ including my own observation of the demeanor of the witnesses,⁵ and after considering the briefs filed by the parties,⁶ I make the following

FINDINGS OF FACT

10 I. Jurisdiction

Respondent Kroger Limited Partnership I, a limited partnership, is engaged in the retail sale of grocery and related products at its facility in Normal, Illinois, where it annually derives gross revenues in excess of \$500,000, and purchases goods valued in excess of \$50,000 directly from points outside the State of Illinois. Respondent admits, and I find, that Kroger Limited Partnership I is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent denies that KRGP, Inc., is an appropriate Respondent in this matter. (GC. Exh. 1(f).) KRGP, Inc., is the general partner of Kroger Limited Partnership I. (Tr. 97.) The Revised Uniform Limited Partnership Act (RULPA), and its predecessors, the Uniform Limited Partnership Act of 1976 and the Uniform Limited Partnership Act of 1985, are the standards used by most State laws that have addressed limited partnerships. See 59A Am. Jur. 2d Partnership § 851 (2013); Partnership Law and Practice § 23:3 (2013). Under any of these models, general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise provided by law. See 59A Am. Jur. 2d Partnership § 851 (2013). General partners in limited partnerships are liable to third parties in the same manner as general partners in general partnerships. Id. Thus, I deny Respondent's request to dismiss Respondent KRGP, Inc., from these proceedings and find that it is properly named as a Respondent. In this decision, "Respondent" refers to both the partnership and the general partner.

Furthermore, in its answer, Respondent denied knowledge or information sufficient to form a belief as to the statutory labor organization status of Laborers International Union of North America, Local Union No. 362 (Union). (GC Exh. 1(f).) The Union's secretary-treasurer, Eric Penn, testified that the business of the Union is to deal with labor disputes, wages, pay rates, working hours, and working conditions of its members. (Tr. 50.) The Union negotiates contracts and its members participate in the Union by attending meetings and voting in internal elections.

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³ Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief.

⁴ I make the following corrections to the transcript: Tr. 97, L. 24: "one percent" should be "one hundred percent"; Tr. 98, L. 11: "in" should be "and"; and Tr. 133, L. 11: "near your school" should be "near your store."

⁵ Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

⁶ The Charging Party did not file a brief.

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(Tr. 49.) As a field representative for the Union, Penn represents members and contractors in dealing with companies that may hire members of the Union. (Tr. 51.) General Counsel's Exhibit 9 is a contract between the Union and Central Illinois Builders of A.G.C., concerning such matters as employee wages and hours of employment. Inasmuch as there is no evidence contradicting Penn's testimony concerning the Union's business, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent operates a grocery store located in Normal, Illinois (Kroger store or Normal store). The Kroger store at issue is located within the Kroger Central Division, which encompasses Indiana, Michigan, Illinois, and Missouri. (Tr. 95–96.) The headquarters of the Central Division is located in Indianapolis, Indiana. The property on which the Kroger store in Normal, Illinois, is situated is owned by Respondent Kroger Limited Partnership I. (R. Exh. 1; Tr. 95.) A diagram of the Normal, Illinois Kroger store and surrounding property is contained in the record as General Counsel's Exhibit 8.

Bonnie Smith is the manager of the Normal, Illinois Kroger store. Respondent admits, and I find, that Smith is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(f).)

B. Respondent's Community Ambassador Program

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Respondent maintains a Community Ambassador Program. This program shifts the decision making for local requests for donations to those who best know the community (i.e., local decision makers). (GC Exh. 12.) The program, which applies to the entire Central Division, directs local support for programs including: Scouting for Food, Share Your Feast, and other food drives; hospitality for Boy Scout popcorn sales, Girl Scout cookie sales, and Salvation Army bell ringers; cancer events in the local community; and coin box and scan drive programs. (GC Exh. 12.)

The details of the program state, in pertinent part:

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The correct role for each Community Ambassador will be determined in consultation with and subject to direction from each Store Manager. What is appropriate in one community or neighborhood within a larger community may not be appropriate in another.

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(GC Exh. 12.)

Linda Huddleston is the community ambassador at the Normal store. In this role, she approves donation and solicitation requests. (Tr. 129, 152.) Although Huddleston may consult with the store manager, she is able to give final approval to these requests. Id.

Huddleston is an agent of Respondent. Agency may involve express or apparent authority. The Board applies common-law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Pan-Oston Co.*, supra, citing *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the act in question. *Pan-Oston Co.*, 336 NLRB at 306, citing *Southern Bag Corp.*, 315 NLRB 725 (1994). Either the principal must cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (citing Restatement 2d, Agency, §27 (1958, Comment (a)). Huddleston is entrusted with giving approval to requests to solicit on the premises of the Normal store and it is Huddleston who communicates such approval to outside groups. Accordingly, I find that Huddleston is an agent of Respondent within the meaning of Section 2(13) of the Act.

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Huddleston does not keep any records, other than her calendar, regarding requests to solicit. (GC Exh. 13; Tr. 153.) Huddleston did not offer testimony regarding any specific groups to which she has denied permission to solicit. Smith, on occasion, will act on requests to solicit without involving Huddleston. Smith has denied other groups permission to solicit at the Normal store, including a church. (Tr. 45–46.)

During the past few years, several groups have been allowed to solicit the public while on Kroger property. In the fall, local Boy Scouts are allowed to sell popcorn and, in the winter, local Girl Scouts sell cookies at the Normal store. (Tr. 133–134.) From mid-November through Christmas, Salvation Army bell ringers are allowed to solicit money outside of the Normal store. (Tr. 134–135.) Two other local groups, the Twin Cities School of Dance and Illinois State University Drama Club, have recently been allowed to sell candy bars at the Normal store. (Tr. 139–140.)

In addition, Kroger employees sometimes engage in solicitation in the Normal store for various groups, including Susan G. Komen for the Cure (Komen). (Tr. 136.) In support of this effort, representatives of Komen and store associates register participants for a race. (Tr. 136.) The Community Ambassador Program also supports food drives, such as Scouting for Food and Share Your Feast. (GC Exh. 12.) The community ambassador program also supports quarterly coin box and charitable scan efforts for organizations such as Toys for Tots. (Tr. 136–137.)

Respondent's witnesses offered somewhat different understandings of Kroger's solicitation policies. According to Mark Fjelde, an associate and labor relations specialist in Respondent's human resources department, Respondent does not allow solicitations in which people distribute literature or documents that "espouse a cause or protest something." (Tr. 97.) Neither Smith nor Huddleston was asked about the existence of such a policy. Respondent did not produce documentary evidence of such a policy. In response to a leading question by Respondent's

⁷ Counsel for the General Counsel issued two subpoenas duces tecum to Respondent seeking its policies regarding nonemployee solicitation on Respondent's property. (GC Exhs. 2, 11.) No such policy was produced at the hearing. Due to the lack of supporting documentary evidence, I do not credit Fjelde's self-serving testimony on this point.

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counsel, Smith testified that she was not aware of any group being allowed to distribute literature or proselytize for or against any cause on Respondent's property. (Tr. 111.)

C. Respondent's Remodeling Project

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Respondent undertook to remodel its Normal, Illinois store in March 2013 and hired a contractor which did not use local union labor for the job. (Tr. 53–54.) When the Union learned that Respondent was using an out-of-town contractor for the project, it protested in various ways. Initially, union members called the store and protested Respondent's use of its contractor. (103–104.) Smith estimated that she received 25 calls related to the remodeling project on March 6.9 (Tr. 104.)

D. Union Solicitation at the Normal Kroger Store

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On March 6, Eric Penn sent two union members (Anthony Sipes and Glen Arbogast) to distribute handbills at Respondent's Normal store. These members stood outside the doors of the store on the sidewalk and handed flyers, stating "SHAME ON KROGER," to customers entering the store. (GC Exh. 5.) The flyers indicated that Kroger was using an out-of-town contractor, which was not using local workers, to perform work at the store. (Id.) The flyers urged customers to call the manager of the Normal store to tell Kroger to use a local contractor employing local workers. ¹⁰ (Id.)

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After learning of the handbilling activity, Smith called her district manager. (Tr. 105.) Smith's district manager told her to "grab a union department head" to accompany her to speak to the handbillers. (Tr. 105.) After speaking with the district manager, Smith, accompanied by Meat Manager Gary Parsons, went outside to investigate. (Tr. 105.) Smith approached Sipes, who was standing outside of the east entrance door to the Normal store. Sipes estimated that he had been handbilling for 25 minutes at the time he was approached by Smith and Parsons. (Tr. 78.)

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Smith asked Sipes if she could help him. (Tr. 78, 105.) Sipes told Smith that he and Arbogast were handbilling to let the public know that Respondent had hired a contractor who was not using local workers. (Id.) Smith told Sipes that he and Arbogast would have to leave the property. (Id.) Sipes and Arbogast quickly left their posts and went to the parking lot to call Eric Penn. (Tr. 78–79, 86.)

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⁸ For the same reason that I did not credit Fjelde's testimony, I do not credit the testimony of Smith on this point.

⁹ Smith's testimony that union members were calling the store stands uncontroverted. Penn was not asked about, nor did he offer any testimony about, these calls. In any event, the lawfulness of the calling effort is not before me.

¹⁰ Sipes' location is indicated by the letter B on GC Exh. 8. Arbogast's location is indicated by the letter A on the same exhibit.

¹¹ It is reasonable to infer that Smith must have known that the "gentlemens [sic] at the front door passing out pamphlets" were from the Union based upon her later testimony that her district manager told her to grab a "union department head" before confronting the men. (Tr. 105.) Therefore, I find that Smith was aware that the handbillers were union representatives before she went to speak with them.

Penn later came to the Kroger store and spoke to Smith. (Tr. 57.) Penn asked Smith how the Union could get permission to solicit. Id. Smith provided Penn with a telephone number (1-800-Kroger) to call. (Tr. 57, 112.) Penn did not call the 1-800-Kroger number because he discovered other locations for the Union to engage in its protest. (Tr. 72.) Smith did not direct Penn to contact the community ambassador. (Tr. 112.) In any event, Respondent maintains that it does not permit individuals to approach customers to discuss political, religious, or "other" causes or to distribute literature to the public. (Tr. 96–97.) Furthermore, according to Huddleston, the Union would not have gotten anywhere with its solicitation request had they called 1-800-Kroger. (Tr. 154.)

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The Union later distributed flyers under windshields of customer cars in Respondent's parking lot. They also returned and engaged in handbilling and bannering on the public right-of-way adjacent to the Kroger store on March 14, during the week of March 18, and on May 4. (Tr. 58–63.) On one occasion, the Union employed an inflatable rat in conjunction with its handbilling and bannering. (Tr. 63–64.) The lawfulness of the Union's activities, or Respondent's reactions thereto, on subsequent dates are not at issue in this case.

DISCUSSION AND ANALYSIS

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A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-ornothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Credibility of the witnesses is not generally an issue in this case as there is little variation among their testimony. Where necessary, however, my credibility findings are incorporated into the findings of fact set forth above.

B. Respondent Violated the Act by Excluding the Union from its Property

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The General Counsel asserts that Respondent violated the Act by prohibiting the Union's solicitation activity while permitting other organizations to solicit. Respondent argues that it lawfully excluded the Union's agents from its property because: (1) the Union had a reasonable alternative means to communicate its message; (2) it did not engage in prohibited discrimination, and (3) the handbilling at issue was a trespass under Illinois law.

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Arbogast and Sipes are not employees of Respondent and they were not involved in organizing activities, directed at either Respondent's employees or others, on March 6. Instead, Arbogast and Sipes acted as union representatives, publicizing a dispute between the Union and Respondent over Respondent's use of an out-of-town contractor in a remodeling project. The Union's representatives distributed their messages of protest on Respondent's private property. Arbogast and Sipes were peaceful in their distribution of the handbills and there is no allegation

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that they were involved in any sort of picketing. It is also undisputed that Respondent ousted the Union's handbillers from its private property and that Respondent permitted other non-union, non-boycott solicitation and distribution on its property.

Initially, I find that the handbilling by Arbogast and Sipes was protected under the Act. It is well established that union representatives have a statutorily protected right to engage in peaceful handbilling. Whether the handbill is considered a form of consumer information as to a union's dispute with an employer, consumer boycott handbilling, or even a form of secondary handbilling, it is clearly protected under Section 7 of the Act. *Glendale Associates, Ltd.*, 335 NLRB 27 (2001), citing *Oakland Mall*, 316 NLRB 1160, 1163 fn. 14 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996). See also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (the Act does not proscribe peaceful handbilling urging even a total consumer boycott of neutral employers). Thus, I find that Respondent expelled union representatives from its premises for engaging in peaceful Section 7 activity.

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It is worth noting that I agree with Respondent's argument that the General Counsel would not prevail were the proper analysis based solely on Respondent's property rights. Under extant Board law, Respondent has the burden of showing that it had a sufficient property interest to exclude solicitors from its property. See *Wild Oats Market*, 336 NLRB 179, 180 (2001); *Best Yet Market*, 339 NLRB 860, 862–863 (2003). See also *Roundy's Inc. v. NLRB*, 674 F.3d 638, 650 (7th Cir. 2012) (the Board, since *Lechmere*, has consistently required the employer to meet a threshold burden of establishing that it had an interest which entitled it to exclude individuals from its property at the time it expelled nonemployee union solicitors). In this case, Respondent has established that it, in fact, owned the premises from which it excluded the Union's handbillers on March 6. (R. Exh. 1.) Under Illinois law, a person commits criminal trespass to real property when he knowingly remains upon the land of another, after receiving notice from the owner or occupant to depart. 720 ILCS 5/21-3(a)(3). Under this statute, Respondent would have been within its rights to summon the police and seek both the removal of Arbogast and Sipes and criminal charges, had they refused to depart when asked to do so by Smith.

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However, I conclude that the application of Illinois trespass law is not the end of the analysis. For it was not Respondent's exercise of its property rights that violated the Act; it was Respondent's *discriminatory* exercise of those rights. Respondent took action expelling Arbogast and Sipes only after discovering that they were union representatives distributing boycott materials. Additionally, as I have found, Respondent regularly allowed other sorts of solicitation on its property. Therefore, although Respondent's exercise of its property rights might not violate the Act in other circumstances, I find that Respondent's discriminatory exercise of those rights in this case violates the Act.

I conclude that the General Counsel prevails in this case based upon Respondent's discriminatory enforcement of its solicitation policy. The Supreme Court has held that an employer may limit nonemployee distribution of union literature so long as it does not discriminate against union literature by allowing other distribution. *Lechmere, Inc., v. NLRB,* 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956). Following these decisions, the Board has consistently held that an employer that denies a union access while

regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation. *Salmon Run Shopping Center*, 348 NLRB 658, 662

(2006), enf. denied in relevant part 534 F.3d 108 (2008). See also *Big Y Foods*, 315 NLRB 1083 (1994); *Victory Markets*, 322 NLRB 17 (1996).

I find the Board's decision in *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), controlling in this case. In *Sandusky Mall*, union business agents engaged in peaceful handbilling at a store entrance. 329 NLRB at 618. The handbillers asked the general public not to patronize a store because of its use of a nonunion contractor on a remodeling project. Id. The mall's security guards asked the handbillers to leave on two occasions and, when they refused to leave on a third occasion, the police were called and the handbillers were charged with trespass. 329 NLRB at 618–619. Both before and after the union handbilling, the mall's owners allowed charitable, civic, and other organizations to solicit within the mall. 329 NLRB at 619. On these facts, the Board found a violation of the Act because the mall's tolerance of solicitations by other organizations provided sufficient proof of disparate treatment of the union handbillers. 329 NLRB at 621.

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I do not find the facts in this case distinguishable in any significant way from those in *Sandusky Mall*, supra. In this case, the Union's peaceful handbillers were protesting Respondent's use of a nonunion contractor in a remodeling project. Furthermore, Respondent has allowed solicitation on its property by several other groups, including Boy Scouts, Girl Scouts, the Salvation Army, and two schools. Therefore, as in *Sandusky Mall*, I find that Respondent violated the Act by expelling the Union's handbillers from its property while allowing other groups to solicit.

I further find that Respondent's discrimination is evident from the very language of its Community Ambassador Program. Respondent's policy states

The correct role for each Community Ambassador will be determined in consultation with and subject to direction from each Store Manager. What is appropriate in one community or neighborhood within a larger community may not be appropriate in another.

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(GC Exh. 12.) Thus, the Community Ambassador Program gives each store the authority to permit the solicitations it deems "appropriate" and exclude those it deems inappropriate. Similarly, the *Sandusky Mall* Board found that the mall's policy of permitting access based on its discretion and business judgment unlawfully discriminatory vis-à-vis union solicitation of customers. 329 NLRB at 622. The Board noted that the respondent prohibited the dissemination of a message protected by the Act, while at the same time permitting the dissemination of a wide range of other messages. Id. This practice, the Board stated, amounted to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes. Id. The policy and its application in this case are similar. The Community Ambassador Program allows Respondent to permit solicitation that it likes and to forbid solicitation that it dislikes. As stated by the Board in *Sandusky Mall*, to allow such a subjective criterion to govern access would eviscerate Section 8(a)(1)'s purpose of preventing discriminatory treatment of unions by employers who permit other nonemployee entities to solicit on the employer's property. 329 NLRB at 622, citing *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 591 (D.C. Cir. 1996).

In the instant case, Respondent has shown a tolerance for various types of solicitations on its property. Respondent, however, does not wish to have a group engaging in Section 7 activity, urging consumer action against it, on its property, Under the analysis presented in *Sandusky Mall*, supra, Respondent may not do so without violating the Act.

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Respondent's attempt to distinguish the activity at issue here from other sorts of solicitation rings hollow. As in *Sandusky Mall*, supra, it is of no moment that Respondent has used its same policy to deny access to other nonunion individuals and groups whose message it disliked or considered bad for business. 329 NLRB at 622. The Act does not protect those nonunion activities, so Respondent may ban any or all of them. Id. What Respondent cannot do, however, is prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing other civic, charitable, and promotional activities. ¹² Id. This is exactly what Respondent has done in the instant case.

15 I further find the case of Oakland Mall, Ltd., 316 NLRB 1160 (1995), distinguishable from this case. Initially, I note that Oakland Mall predates the Board's Sandusky Mall decision by several years. Secondly, the Board in Oakland Mall did not discuss the so called "discrimination exception" to Babcock & Wilcox, 351 U.S. 105, 112 (1956). In Babcock & Wilcox, the Supreme Court stated, "It is our judgment, however, that an employer may validly post his property 20 against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." (Emphasis added.) Id. Here, I have found that Respondent discriminated against the Union by allowing other distribution on its property. Thus, because the complaint alleges, 25 and I have found, that Respondent's discrimination in enforcing its solicitation policy violated the Act, it is not necessary to discuss whether alternative means were available to the Union to distribute its message.¹³

I am mindful that courts of appeal have rejected the Board's analysis that an employer's approval of charitable or civic distribution, while excluding union distribution, amounts to discrimination. See *Salmon Run Shopping Center v. NLRB*, 534 F.3d 108, 116 (2d Cir. 2008). See also *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996); *Sandusky Mall Co. v*, NLRB, 242 F.3d 682 (6th Cir. 2001); *Be-Lo Stores*, 126 F.3d 268 (4th Cir. 1997). However, where there is a conflict between court and Board law, the Board's duty to apply uniform policies under the Act, as well as the Act's venue provisions for review of Board decisions, preclude the Board from acquiescing in contrary decisions by the courts of appeals. *Tim Foley Plumbing Service, Inc.*, 337 NLRB 328 fn. 5 (2001).

I am also mindful that the Board may be reconsidering its position in this area of the law. However, *Sandusky Mall*, supra, is still the law at this time and, as an administrative law judge of the Board, I am bound by the Board's decisions which the Supreme Court has not reversed. *Iowa*

¹² The frequency and variety of permitted activities far exceeds the tolerance of isolated beneficent solicitation that the Board might regard as narrow exceptions to an otherwise valid, nondiscriminatory nosolicitation policy. 329 NLRB at 621, citing *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

¹³ As such, Respondent's defenses that the Union could have conducted its handbilling elsewhere or on public property fail.

Beef Packers, 144 NLRB 615, 616 (1963); *Waco, Inc.*, 273 NLRB 746 fn. 14 (1984). ¹⁴ Therefore, for the foregoing reasons, I find that Respondent violated the Act as alleged in the complaint.

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CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By excluding the Union from distributing literature on its premises, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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REMEDY

- Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.
- On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

Order

- The Respondent, Kroger Limited Partnership I, a limited partnership, and KRGP, Inc., general partner, Normal, Illinois, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- 35 (a) Discriminatorily refusing to allow the Union to distribute literature on its premises.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹⁴ In its decision in *Roundy's Inc.*, 356 NLRB No. 27 (2010), enfd. 674 F.3d 638 (2012), the Board announced that it was inviting briefs regarding "the question of what legal standard the Board should apply in determining whether an employer has violated the Act by denying nonemployee union agents access to its premises while permitting other individuals, groups, and organizations to use its premises for various activities." 356 NLRB No. 27. slip op. at 1. The Board has not yet issued a supplemental decision on this topic. I believe that this case is factually similar to *Roundy's, Inc.*

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facility in Normal, Illinois copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 2013.

20 Dated, Washington, D.C. February 7, 2014

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25 Melissa M. Olivero
Administrative Law Judge

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily prohibit representatives of Laborers International Union of North America, Local Union No. 362 from engaging in lawful handbilling on our premises in Normal, Illinois, Store No. J347.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

		GENERAL PARTNER (Employer)	
Dated	By		
		(Representative)	(Title)

KROGER LIMITED PARTNERSHIP I, A

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577 (317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.